

2008

John Nikols v. Goodman and Chesnoff, David Z. Chesnoff : Brief of Appellant

Utah Court of Appeals

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Plaintiff and Appellant,

v.

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Corporation, and DAVID Z.
CHESNOFF,

Defendants and Appellees.

Case No. 20080503-CA

BRIEF OF APPELLANT

APPEAL FROM A DECISION AND ORDER AUTHORIZING WRIT OF
ATTACHMENT AND DENYING MOTION FOR DISCHARGE OF WRIT OF
ATTACHMENT IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, THE HONORABLE JOHN PAUL KENNEDY PRESIDING.

FILED
UTAH APPELLATE COURTS

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2008) because this case was transferred by the Utah Supreme Court. The Honorable John Paul Kennedy, Third District Court, Salt Lake County, State of Utah, entered Judgment denying Appellant's Motion for Discharge of Writ of Attachment on April 29, 2008.

STATEMENT OF ISSUES PRESENTED FOR REVIEW; PRESERVATION

Issue 1: Did John Nikols establish that he held the four Murray properties in a purchase money resulting trust where they were titled in his son's name?

Standard of Review: The court will not **disturb** a trial court's findings of fact unless the evidence clearly preponderates against it in reviewing the creation of a purchase money resulting trust. In Re Estate of Hock, 655 P. 2d 1111, 1114 (Utah 1982).

Preservation: Counsel for Appellant argued that the intent of the trustee is irrelevant to the creation of a purchase money resulting trust, in which the intent of the grantor is determinative. R. 2953: 126 (15-19).

Issue 2: Did the court err in imposing an adverse inference against John Nikols after it conditioned Michael Nikols' testimony upon a waiver of his privilege against self incrimination?

Standard of Review: Questions of law are reviewed for correctness. State v. Harmon, 910 P.2d 1196, 1199 (Utah 1995).

Preservation: Counsel for Appellant objected to the court's ruling that John Nikols could not call Michael Nikols to the stand unless Michael waived his privilege against self incrimination. R. 2953: 118-19.

Issue 3: Did the district court err in drawing an adverse inference against John Nikols when Appellee Chesnoff chose not testify in support of his two claims: that he relied on the title to secure payment and that John was also a debtor?

Standard of Review: Questions of law are reviewed for correctness. Harmon, 910 P. 2d at 1199.

Preservation: Counsel for Appellant told the Court she welcomed Mr. Chesnoff's testimony regarding conversations he had with John Nikols and that it was not her position to prevent Mr. Chesnoff from testifying on his own behalf. R. 2953: 135 (7-9).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 25-5-4, Utah Rules of Evidence 608 and 609, and Utah Rule of Professional Conduct 1.6 are in the Addendum.

STATEMENT OF THE CASE

Appellee Chesnoff obtained a judgment against Michael Nikols for unpaid attorney fees. As a creditor of Michael Nikols, Mr. Chesnoff cannot attach property titled in Michael's name but owned by Michael's father, Appellant John Nikols. The Court found John established a purchase money resulting trust, based on his testimony and evidence he made the mortgage payments and incurred all other obligations. The Court erred, however in ruling that, John's prima facie case alone, with no evidence presented to the contrary, was overruled by two adverse inferences against him for failing to "produce" witnesses he was under no obligation to present. The Court erred in allowing those inferences to serve as a substitute for affirmative evidence of Mr. Chesnoff's claims. These inferences against John, without corroborative evidence supporting Mr. Chesnoff's defenses, were insufficient to override John Nikols evidence of a resulting trust in his favor.

STATEMENT OF THE FACTS

The Properties Mr. Chesnoff Attached

John Nikols, a Greek immigrant, established Coachman's Restaurant at 1301 South State Street when he purchased the land in 1975. R. 2953: 45 (1-2). The 1301

South State Street property has been titled in John Nikols' name for its entire existence and in its 33 years has become a fixture in Salt Lake City.¹ R. 302, Exhibit A.

To further invest in real estate, in 1978 John Nikols purchased a plot of land facing State Street at 4338 South ("the primary property"). R. 2953: 53 (6-7); 88 (9-16). The primary property has also been titled in his name since its existence. R. 2953: 99 (18-21). Abutting properties to the primary property later came for sale. R. 2953: 90 (12-15). In 1988 and 1994 John purchased four lots adjoining his primary property to establish a larger, more valuable investment. R. 2953: 90-91. These four properties ("the four Murray properties") are the subject of this appeal.

The first addition came in 1988 when John purchased three adjoining lots to the primary property.² R. 2953: 58-59; P. 89 (14-23). At his realtor's suggestion, John titled these first three properties to his son, Michael Nikols, because he wanted to secure an immediate purchase and was not sure of the status of outstanding judgments against him. R. 2953: 60 (1-19); 76 (3-18); 90 (3-7); 97 (7-9). The second addition came in 1994 when John purchased the fourth adjoining lot, also titling it in Michael's name.³ R. 2953: 60 (1-19). He did so for continuity and ease.

The Encumbrance

The four Murray properties became encumbered on November 18, 2004 when Michael Nikols was indicted on one count of conspiracy to distribute narcotics and one

¹ John Nikols' residence at 2256 Lakeline Circle also has been titled in his name since he purchased it in 1976. R. 2953: 51 (1-6); 105: (16-18).

² These properties are located at 71 East 4340 South, 85 East Edison Avenue, and 75 East Edison Avenue. R. 2953: 51; 105.

³ The fourth property is located at 72 East Fireclay Avenue.

count of possession of one or more firearms in furtherance of a drug trafficking crime. R. 800, Attachment 4. The indictment included a notice of intent to seek criminal forfeiture of real and personal property titled in Michael's name. Id. The federal government's seizure included the Coachman's Restaurant at 1301 South State Street and the four Murray properties. The government also attached Michael's residence at 1402 West Van Buren Avenue in Salt Lake City, which he purchased in approximately 2001. Id.

Michael retained Mr. Ron Yengich as counsel. R. 532: Attachment B (¶ 6). Mr. Yengich did extensive work on Michael's case, filing numerous motions. After his extensive work on Michael's case, the Court discharged Mr. Yengich on June 2, 2005 for a conflict of interest based on the government's claim that it intended to offer one of Mr. Yengich's former clients a reduced sentence for providing information against Michael. R. 532: Attachment B (¶ 7). His discharge came just three months before Judge Cassell's firm final change of plea deadline of September 27, 2005. R. 355: (¶ 4).

The Initial Consultation with Mr. Chesnoff

To replace Mr. Yengich, Michael hired Las Vegas attorney David Chesnoff. Michael and his father, John Nikols, initially met with Mr. Chesnoff in his Las Vegas office on or about July 2, 2005 (the "initial consultation"). R. 355: (¶ 2). During the initial consultation John and Michael made it clear that the forfeiture aspect of the case was critical because John owned the Murray properties. R. 2953: 3-9. John explained to Mr. Chesnoff that the Coachman's was titled in John's name and Michael had never had any ownership interest in Coachman's, that John had titled all four Murray properties in Michael's name as an asset protection strategy, and that Michael never paid for them and

never had actual control of them. R. 2953: 95 (5-13). At this meeting, Mr. Chesnoff told Michael and John that the forfeiture claims could be easily addressed and that he would hire forfeiture expert to dispose of the forfeiture claims. R. 532: Attachment A (¶ 10).

For his services, Mr. Chesnoff charged Michael Nikols a nonrefundable flat fee of \$350,000. The parties did not discuss whether the fee would be adjusted if Michael's case did not go to trial. R. 532: Attachment B (¶ 10). John Nikols emphasized to Mr. Chesnoff that clearing the Coachman's Restaurant of the government's lis pendens was a priority because John needed to borrow against the Coachman's to pay Mr. Chesnoff's fees until Michael could pay him back. R. 996, Exhibit A: 4 (¶ 1, 2).

Mr. Chesnoff's Representation

Before Michael Nikols accepted a plea, Mr. Chesnoff appeared three times. His first and second court appearances in Michael's case were at status conferences on July 15 and September 29, 2005. R. 639, Attachment F; R. 421, Exhibit C. On October 6, 2005, Mr. Chesnoff attended a Court hearing to discuss Michael's detention. R. 996, Exhibit 2. During his appearances, Mr. Chesnoff, as an officer of the court, told the Honorable Paul Cassell that the property attached to the government's claim was not Michael Nikols' and that no portion of Michael's drug proceeds had been used to pay for the land. R. 421, Exhibit C: 6 (13-21); R.996.

On October 18, 2005, three months after Mr. Chesnoff filed his appearance, Michael pled guilty to count 1 of the Indictment. R. 800, Exhibit 6: 18. That day he was sentenced to seventy (70) months custody. Id. The settlement required him to pay a

\$200,000 judgment in lieu of the government's foreclosure of the properties identified in the forfeiture claims. R. 800, Exhibit 7.

Post-Plea Events

On his son's behalf, John Nikols paid the \$200,000 forfeiture settlement to clear his properties even though he was under no legal obligation to do so. R. 1957: 6 (¶ f, g). The Government then released the lis pendens on all six of the real properties. R. 800, Exhibit 7. However, the \$200,000 was returned to John and the lis pendens was reinstated on the properties on October 16, 2006 when the federal court granted Michael's petition to withdraw his plea. Michael's criminal case is currently pending trial.

Mr. Chesnoff's Current Collection Suit

Mr. Chesnoff and his firm filed suit on December 9, 2005 against Michael Nikols seeking \$190,000 in legal fees he had not received toward his \$350,000 flat fee. R.1. Three days later, Mr. Chesnoff motioned for a prejudgment writ of attachment on six parcels of property, including the Coachman's Restaurant, which he had actual notice was not titled in Michael's name. R. 27. The following day, Mr. Chesnoff filed a new motion for prejudgment attachment, this time requesting that it be ex parte. R. 39. Michael answered and counterclaimed on January 20, 2005. R. 107. John Nikols commenced his own action against Mr. Chesnoff and his firm alleging malpractice with respect to his handling of the forfeiture claim. R. 133. The two cases were consolidated. R.157.

On summary judgment, the Court found that Michael was Mr. Chesnoff's debtor for the outstanding amount and that there was no basis for John's claims since there was no attorney-client relationship between John and Mr. Chesnoff. R. 1957: 4-6. The Court's order made four relevant findings: first, Michael entered into a retainer agreement for \$350,000 with Mr. Chesnoff and owed the principal amount of \$190,000 to Mr. Chesnoff; second, that there was a dispute of actual ownership regarding the properties and further discovery was required; third, there was no attorney-client relationship between Mr. Chesnoff and John; and fourth, the \$200,000 settlement in lieu of forfeiture on the four Murray properties "was against Michael only, and John was not obligated to pay the \$200,000 judgment, nor was he a party to the plea agreement." R. 1957: 4-6.

After obtaining summary judgment, Mr. Chesnoff sought to execute the writ of attachment and satisfy his judgment against the four Murray properties. R. 2041-43. John Nikols opposed execution of the writ, arguing that he created a purchase money resulting trust as owner of the properties. R. 2953: 126.

Evidentiary Hearing

At the evidentiary hearing, John Nikols restated his claim of ownership. He explained exactly how he found and purchased the properties and why the properties were titled in his son's name. R. 2953: 58-59; 89 (14-23). Michael Nikols proffered that he was prepared to testify that the properties were not a gift to him but indicated that he would assert his Fifth Amendment right against self incrimination if questioned about matters relating to his pending criminal trial. R. 2953: 118-19. Mr. Chesnoff argued that

he could not fully cross examine Michael and impeach his credibility if he was unable to ask him about facts underlying the pending criminal charges. R. 2953: 142 (18-21). The Court agreed and held that Michael would not be permitted to testify about the conveyance in 1988 and 1994 unless he waived his Fifth Amendment privilege and responded to questions about the pending criminal charges. R. 2953: 120 (3-8). Michael Nikols declined to waive his Fifth Amendment rights and proffered his deposition testimony taken by Mr. Chesnoff's counsel. R. 2953: 120(9). The Court declined to accept the deposition based upon the representation of Mr. Chesnoff's counsel that the deposition was inadequate. R. 2953: 117 (13-15). John Nikols then submitted his case on the evidence he presented.

Instead of presenting evidence to rebut John Nikols' evidence, Mr. Chesnoff's counsel stated that if Mr. Chesnoff testified Michael's attorney-client privilege would be waived and his testimony would adversely effect Michael's criminal case. R. 2953: 117 (2-7); R. 2953: 129 (8-11); R. 2953: 155 (10-20). Michael also refused to waive his attorney-client privilege about privileged communications he had had with Mr. Chesnoff about his criminal case. R. 2953. Mr. Chesnoff did not take the stand to testify regarding discussions between himself and John Nikols. R. 2953.

The Court found John met his burden but allowed the improper adverse inferences – and nothing more – to eliminate John's prima facie showing:

“I'm troubled by the fact that it appears that, at least from one side of the testimony, that John Nikols has invested his money in buying these properties and that he's claimed that he's regarded them as his properties ... I mean, I don't — I don't think that you win just by presenting the prima facie case.”

R. 2953: 152-53.

The Court's final order included, in part, the following findings of fact and conclusions of law:⁴

John Nikols and his son both expressed their desire that David Chesnoff not testify regarding the issues before the Court, including issues of credibility of John and Michael Nikols. R. 2930.

Michael Nikols' refusal to testify and the opposition of Michael and John Nikols to the testimony of David Chesnoff were prejudicial to the ability of Chesnoff to be able to present his position in this matter in a full and complete manner. R. 2930.

John Nikols has not presented testimony from available and knowledgeable witnesses (Michael Nikols and David Chesnoff) to support his claim regarding the existence of a resulting trust in his favor regarding the Murray properties. R. 2930.

The Court therefore presumes that the testimony of Michael Nikols and David Chesnoff, had it been presented, would have been adverse to the claims of John Nikols regarding the purported resulting trust. R. 2930.

The Court concludes that John Nikols failed to meet his burden of establishing that a resulting trust existed with respect to the Murray properties. R. 2930.

John Nikols commenced this appeal shortly thereafter. R. 2930.

SUMMARY OF THE ARGUMENTS

John Nikols conclusively showed a resulting trust in his favor by establishing that he intended to retain the beneficial interest in the property and by showing he was both benefitted and burdened by the land. Any intent to avoid his creditors when the resulting trusts were created in 1988 and 1994 does not eliminate his current equitable interest in

⁴ Counsel for Mr. Chesnoff submitted a proposed order to which John Nikols submitted objections.

the properties – it only allows *his* creditors as of that time to pierce his interest. Michael Nikols’ creditors cannot reach what is owned by Michael’s father.

The Court erred in drawing an adverse inference against John Nikols based upon Michael Nikols’ failure to testify. The Court erroneously conditioned Michael’s testimony on a complete waiver of his Fifth Amendment right against self-incrimination in an unrelated criminal case to permit opposing counsel to impeach his credibility. Mr. Chesnoff’s counsel could have questioned Michael about his involvement in the transfer of title and his father’s intent without questioning him about his involvement in drug dealing and communications made to Mr. Chesnoff regarding that case. Moreover, Rules 608 and 609 of the Rules of Evidence prohibited Mr. Chesnoff from cross-examining Michael Nikols about the facts underlying the federal drug and firearm charges.

It was error to draw an adverse inference against John based upon Mr. Chesnoff’s failure to testify unless he could divulge harmful, privileged communications that were irrelevant to John Nikols’ representations to Mr. Chesnoff regarding payment to him. Mr. Chesnoff could have attempted to establish these claims against John Nikols without violating his attorney client privilege with Michael Nikols. Mr. Chesnoff could not have relied on the properties’ bare title as a surety because at the time the fee agreement was signed he had actual notice of John’s claim of ownership and that the property was encumbered by the federal government’s criminal forfeiture action. In addition, Michael Nikols – not John Nikols – was Mr. Chesnoff’s debtor as evidenced by the plain language of the fee agreement, the absence of any written guarantee and the Court’s prior order finding that John was not the debtor. The Court erred in imposing an adverse inference

against John Nikols where there was no logical expectation that John would produce Mr. Chesnoff as a witness to establish his claim John Nikols had no obligation to call Mr. Chesnoff to the stand to permit Chesnoff an opportunity to establish his defenses.

ARGUMENT

APPELLEE DAVID CHESNOFF CANNOT ATTACH PROPERTY TITLED IN HIS DEBTOR MICHAEL NIKOLS' NAME WHERE HE FAILED TO OVERCOME EVIDENCE APPELLANT JOHN NIKOLS PRESENTED ESTABLISHING THAT HE HELD A RESULTING TRUST IN THE PROPERTY.

John Nikols established that he retained a purchase money resulting trust in the beneficial interest of the four Murray properties when he put its legal title in his son's name. The Court erred in applying an adverse inference against him, overcoming this evidence without evidence to the contrary, simply because he did not call more than one witness and because Appellee Chesnoff chose not to testify on his own behalf.

The district Court erred in three ways. First, it erred in concluding that John Nikols failed to establish a purchase money resulting trust in his favor in the land titled in his son's name. Second, it erred in assigning an adverse inference against John Nikols after it conditioned Michael Nikols' testimony on a waiver of his right against self incrimination in the pending criminal case Finally, it erred in drawing an adverse inference against John Nikols when Appellee Chesnoff chose not to rebut John Nikols' evidence by testifying in support of his two claims.

Because the four Murray Properties are held by John Nikols in a purchase money resulting trust, Appellee Chesnoff cannot reach them to satisfy the judgment he obtained against John's son Michael.

I. JOHN NIKOLS ESTABLISHED THAT HE HELD THE PROPERTIES IN A PURCHASE MONEY RESULTING TRUST.

The Court erred in finding John Nikols did not establish a purchase money resulting trust where the evidence showed he intended to retain the equitable interest and was at all times both benefitted and burdened by the land.

When a parent pays consideration for land but titles it to his child, the courts presume that the conveyance was a gift. John Nikols conclusively rebutted this legal presumption by showing a resulting trust in his favor in two ways. First, he established that he intended to retain the beneficial interest in the property since the date of purchase. Second, he showed he was both benefitted and burdened by the land. Any intent to avoid his creditors when the resulting trusts were created in 1988 and 1994 does not eliminate John's current equitable interest in the property – it only allows *his* creditors as of that time to pierce his interest. Michael Nikols' creditors cannot reach what is owned by Michael's father.

A. JOHN NIKOLS ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT HE INTENDED TO RETAIN THE BENEFICIAL INTEREST IN THE PROPERTY.

A resulting trust is created where one disposes of property under circumstances that suggest that he does not intend for the titleholder to have the beneficial interest in the property. Likewise, a purchase money resulting trust is implied where one person pays for the purchase of land but titles it in the name of another. Hock's Estate, 655 P.2d at 1115.

A sufficient showing that one other than legal titleholder paid purchase price for property makes prima facie case that beneficial ownership rests in the payor. Hocking v. Hocking, 394 N.E. 2d 653, 657 (Ill. App. Ct. 1979). It is undisputed that John Nikols paid for the four Murray properties Mr. Chesnoff seeks to execute. R. 996, Exhibit 2: 23-24; R. 421, Exhibit C: 16 (13-21); R. 2953: 140 (18-21); R. 2953: 40-41.

John Nikols conclusively established the critical element of establishing a purchase money resulting trust by showing he intended to retain ownership of the land. When a parent pays consideration for land but titles it to his child, the courts presume that the conveyance was a gift. See, e.g., In Re Clemens, 472 F.2d 939, 943 (6th Cir. 1972). This presumption can be rebutted by clear and convincing evidence that the parent intended to retain the equitable interest in the property. Id.; See also Hock's Estate, 655 P.2d at 1114 (to establish a resulting trust the evidence must be clear and convincing). When this presumption is rebutted, the beneficial interest of the property is held in trust for the payor (the parent) from the time of the original conveyance. Wilson v. St. Clair, 286 S.W. 2d 554, 556 (1955); Hocking, 394 N.E. 2d at 657. This is true even if his purpose was to avoid judgments against him. Hicks v. Lindell, 573 P.2d 716, 717-720 (Okla. App. 1977); See also Hocking, 394 N.E. 2d at 658.

John Nikols intended to, and did, remain the equitable owner of the properties even though they were titled in his son's name. T. 2953: 106 (22-25). John has owned the primary property facing State Street for 30 years. He was trying to expand that lot. When abutting lots came for sale, he bought them to expand his investment. R. 2953: 58-59; 89 (14-23). His intent to expand a lot that was already titled in his name

demonstrates his intent to retain ownership in the newly-acquired, contiguous four Murray properties.

The presumption of a gift is rebutted if there is evidence that the parent's intent was to retain the property for his own future security, for estate planning purposes, or titled it in his child's name at a bank official's suggestion. Clemens, 472 F.2d at 944 (parent's intent to secure property for future security sufficient to establish resulting trust); In re Moodie, 362 B.R. 554, 560 (Bankr. S.D. Fla. 2007) (parents' intent to ease estate planning sufficient for resulting trust); Chamberlin v. Chamberlin, 359 A.2d 631, 632, 634 (N.H. 1976) (resulting trust created in favor of parents when they placed the title in joint tenancy at a bank official's suggestion). John Nikols testified at the Evidentiary Hearing that he titled the property in his son's name as an asset protection strategy to ensure a quick purchase where he may have had outstanding judgment liens and to maintain consistency thereafter. T. 2953: 60 (12-13). He stated: "The only intent was to secure the properties that day. And did not have no problem to put it on my — on Michael's name. And it was, like I says, it was a suggestion of one of the realtors there." T. 2953: 91-92; 106 (14-16) (22-25).

John Nikols also testified at the evidentiary hearing that he and Michael discussed the arrangement in detail:

"I said, 'Listen, I have to buy this property' — they knew all the time I needed those properties. I needed them for the first property — the front property. So I said, 'You've got a technicality there that it's a lien right now against it.' He knows (inaudible) today I had to put it on somebody's name. I said, 'I want to put it on your — your name.' And is there any objection? He said, 'No. I have no objections whatsoever.'"

Id. In an affidavit to the Court, John Nikols likewise stated:

“When I purchased the four Murray properties, I was concerned they might be subject to a judgment lien. As an asset protection strategy, I therefore had the properties titled in Michael’s name. Before closing on the four properties I explained to Michael that they were not a gift and that I did not intend for Michael to own or control these properties . . . They have never been used by Michael and Michael always understood that I was the true owner of such properties.”

R. 996: 9 ¶ 35. See also R. 2953: 106 (6-9). At all times, Michael Nikols understood he held only the legal title. R. 1824: ¶ 6.

John Nikols also rebutted the presumption that he intended to give the property as a gift by showing that he routinely placed his property in Michael Nikols’ name. The Supreme Court of Montana held that a father clearly and convincingly established that a gift was not intended where he and his son established a practice where the father placed his property in son’s name and his son quitclaimed it back to him after the property was sold. Hilliard v. Hilliard, 844 P.2d 54, 58 (Mont. 1992); See also Walker v. Hooker, 667 S.W. 2d 637, 641-44 (Ark. 1984); Hocking, 394 N.E.2d at 658 (parents established a purchase money resulting trust where they routinely titled their land in their children’s names to avoid foreclosure and for estate planning purposes).

It is irrelevant that John Nikols may have titled the property in his son’s name to ensure it would not be encumbered by his creditors. In fact, this evidence can further support that he did not intend to give the property as a gift. See Wilson, 286 S.W. 2d at 557; See also Hicks, 573 P.2d at 720; See also Hocking, 394 N.E. 2d at 658. For example, where a father named his daughter as a beneficiary of the real estate to insulate himself from his business partner’s creditors, the Appellate Court of Illinois held that he

did not intend to give him the property interest as that kind of transaction frequently occurred. Pratt v. Watson, 559 N.E. 2d 280, 282 (Ill. App. Ct. 1990).

John Nikols' intent to shield his newly-acquired land from his then-existing creditors makes this case analogous to Pratt and Hocking. The evidence showed that John Nikols intended to retain his ownership interest and that this kind of transaction occurred frequently among John Nikols and his son, just like in Clemens and Hilliard. Also, at all times Michael Nikols understood that the conveyance was business related and not a gift, as in Pratt.

B. EVIDENCE THAT JOHN NIKOLS WAS BOTH BURDENED AND
BENEFITTED BY THE PROPERTY REBUTTED ANY PRESUMPTION
THE PROPERTY WAS A GIFT TO HIS SON.

Michael Nikols never received the benefits or shouldered the burdens of the four Murray properties. Courts will evaluate which party encountered the land's benefits and burdens in determining whether the parent intended to retain the beneficial interest in the property or whether the property was a gift.

The intent of the grantor is evidenced by whether he suffered the burdens of the land. Evidence the parent negotiated the purchase price, paid the down payment, paid the mortgage payments, paid the real estate taxes, insurance and maintenance costs of the property rebuts the presumption of a gift. Clemens, 472 F.2d at 944; Hilliard, 844 P.2d at 58; Hocking, 394 N.E. 2d at 657-58. John Nikols admitted into evidence checks from his personal account for the mortgage payment and testified that he paid the property taxes every year from the same account. T. 2953, Defense Exhibit 1; T. 2953: 23-24; 77 (7-11); 92 (17); 93 (6-15); 108 (11-22). John Nikols also maintained the property, such as

paying for and erecting a fence around the property. T. 2953: 109 (2-6). Michael Nikols encountered none of these obligations. Only John Nikols was burdened by the properties.

Courts will also evaluate who benefitted from the property when determining if the parent intended his child to have beneficial interest in the land. Evidence the child did not collect rents or claim any income from the property on his income taxes rebuts the presumption of a gift. Clemens, 472 F.2d at 944 (resulting trust created in favor of a mother who included the income from the property on her income taxes). For example, where a father wanted to assure himself the income from a rental property, reported the rents on his tax returns, and improved and operated the apartment house on the land, the Kentucky Court of Appeals held he created a purchase money resulting trust. Wilson, 286 S.W. 2d 554, 555-57; Moodie, 362 B.R. at 561 (a purchase money resulting trust existed for a mother's benefit where she was the only party who paid for the property, the daughter never received any benefit from the transaction, daughter never believed she had any ownership in property, and never received any proceeds from the sale).

John Nikols retained possession of the four Murray properties and collected the rents. R. 2953: 109 (16-18). As in Hilliard, John Nikols located the properties, negotiated for their purchase, paid for them and all their improvements, collected rents, paid the taxes and maintenance, and treated the property as his own by taking exclusive possession and using it for his business endeavors. Id. Michael Nikols, on the other hand, bore none of the expenses and received none of the benefits, as in Hilliard and Prange. Just like Moodie, John was the only party who paid for the property; Michael neither

received any benefit or burden from the transaction nor believed he had any ownership in property.

C. ANY INTENT TO AVOID HIS CREDITORS WHEN THE RESULTING TRUST WAS CREATED DOES NOT ELIMINATE JOHN NIKOL'S EQUITABLE INTEREST IN THE PROPERTY – IT ONLY ALLOWS HIS CREDITORS AT THAT TIME TO REACH IR.

It is irrelevant to this action that John Nikols may have intended to avoid his creditors when he titled the land to Michael because that act would have only allowed *his* personal creditors to reach the property he held in trust. When A conveys his property to B in order to avoid A's creditors, A's creditors at that time can benefit from the property conveyed. 23 Bogerts Trusts and Trustees § 463. A retains a trust to the equitable interest in the remainder of the property conveyed. Id.; Cowles v. Cowles, 131 N.W. 738, 738 (Neb. 1911).

A judgment lien attaches only to the:

“actual interest the judgment debtor has in real property when the judgment is obtained and recorded. . . However, a debtor retaining bare legal title has no property ‘interest’ to which a judgment lien could attach . . . Thus, ‘a judgment creditor of a debtor holding bare legal title to property cannot attach the equitable interest in the property, as it is vested in another.’”

Capital Assets Financial Services v. Lindsay, 956 P.2d 1090, 1095 (Utah 1998) (internal citations omitted). Under this rationale, the creditors of the payor can proceed against the property on the theory that the debtor is the equitable owner. Bill Nay & Sons Excavating v. Neeley Const. Co., 677 P.2d 1120, 1123 (Utah 1984). For example, where a family corporation enters a purchase contract, makes a down payment and deeds the land to another family corporation after it incurs a judgment by one of its creditors, the first

family corporation retained a purchase money resulting trust in the land and its creditors could attach its equitable interest. Id.

Creditors of the title holder, on the other hand, cannot reach the property in the trust because the title holder does not have any beneficial interest in the property. Hergenreter v. Sommers, 535 S.W.2d 513, 518-20 (Mo. Ct. App. 1976). Bare legal title, without any beneficial interest, leaves nothing to which a judgment lien can attach. Lund v. Donihue, 674 P.2d 107, 109 (Utah 1983). For example, where daughters were the equitable owners of real estate titled in their parents' name, the Missouri Court of Appeals, Kansas City District, held that the property could not be sold in execution of a judgment against their parents. Hergenreter, at 518-20. In Hergenreter, the evidence showed it was understood that the parents took title to the real estate and held it for their daughters' benefit. Id. at 518. The Court found a purchase money resulting trust was established for their daughters, whom paid the earnest money, the down payment, and payments for the deed of trust. Id. at 520.

Only an injured creditor at the time can attack a fraudulent conveyance. In Woodward v. Funderbunk, Larry Funderbunk bought land and conveyed the deed to his son, Jason, because the Mississippi State Tax Commission had recovered a judgment against him. 846 So. 2d 363, 365 (Ala. Civ. App. 2002). Later, a judgment was entered against Jason, the title holder and Larry's son. Id. Larry, as Jason's power of attorney, transferred the property out of Jason's hand. Jason's creditor argued that the transfer was void because it was a fraudulent conveyance to avoid the claim of creditors. Id.

The Court held that the Larry's decision to title the land in his son's name to avoid the Mississippi Tax Commission was fraudulent but that fraudulent conveyances may be attacked "only by a party who is injured or damaged by the conveyance and neither a stranger to the transaction who is neither a creditor nor a purchaser or otherwise affected has no standing to maintain the action." Id. at 366. The Court held that: "The creditors of the resulting trustee [here, Jason] can obtain no interest in the property in question by attaching it for his debts. . . The creditors of the payor [here, Larry], on the other hand, can proceed against the property on the theory that their debtor is the equitable owner." Id. at 369.

In this case, Larry's acts are analogous to John Nikols' acts as parents who titled their land in their child's name. Jason's acts are analogous to Michael Nikols' acts as children who retain bare legal title to their parents land but hold no equitable interest in the property. Thus, as in Funderbunk, Michael Nikols' creditors can obtain no interest in the four Murray properties by attaching it for his debts, just as Jason's creditors could not. However, John Nikols' creditors could have proceeded against the four Murray properties because he is the equitable owner, just as Larry's creditors could.

In conclusion, John Nikols established a resulting trust in his favor by showing he intended to retain the beneficial interest in the property. The law is clear that any intent to avoid his creditors when the resulting trust was created does not eliminate his current equitable interest in the property – it only allows his creditors as of that time to pierce his interest. As strangers to the original conveyance, Michael Nikols' creditors cannot reach what is owned by his father.

II. THE COURT ERRED IN IMPOSING AN ADVERSE INFERENCE AGAINST JOHN NIKOLS AFTER IT CONDITIONED MICHAEL NIKOLS' TESTIMONY UPON A COMPLETE WAIVER OF HIS PRIVILEGE AGAINST SELF INCRIMINATION.

The Court also erred in drawing an adverse inference against John Nikols based upon Michael Nikols' failure to testify. The Court erroneously conditioned Michael's testimony on a complete waiver of his Fifth Amendment right against self-incrimination in an unrelated criminal case. Mr. Chesnoff argued that Michael's invocation of his Fifth Amendment right prevented him from impeaching Michael's credibility should he testify about the resulting trust on the four Murray properties since Michael would not testify about the drug charges pending against him. R. 2953: 142 (18-21). The Rules of Evidence prohibited Mr. Chesnoff from impeaching Michael with the underlying facts of the criminal charges. Mr. Chesnoff could have questioned Michael about his involvement in the transfer of title and his father's intent without questioning him about his involvement in drug dealing.

A. THE COURT ERRED WHEN IT CONDITIONED MICHAEL NIKOLS' TESTIMONY ABOUT THE PROPERTIES' CONVEYANCE UPON A COMPLETE WAIVER OF HIS PRIVILEGE AGAINST SELF INCRIMINATION.

The Court inappropriately required Michael Nikols to make a Hobson's choice at the evidentiary hearing by holding it would not limit cross-examination to facts surrounding the conveyance of title if Michael testified and invoked the Fifth Amendment in response to questions relating to his pending criminal case and his involvement with drugs. R. 2953: 120 (3-8). Nothing Mr. Chesnoff wanted to ask

Michael Nikols was admissible. He wanted to cross examine Michael about the pending drug trafficking charge in order to impeach his credibility.

The U.S. Supreme Court has held that arrest without a conviction cannot be used to impeach the witness's integrity. Michelson v. U.S., 69 S.Ct. 213, 222 (1948). "Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." Id. (distinguishing rule permitting cross-examination of character witness for defendant as to arrest of defendant for other offenses from rule prohibiting cross-examination of witness as to arrest of witness himself).

The Supreme Court of Utah has likewise said that neither reason nor justice allow questioning to adduce a fact that a witness has been charged with a certain crime. State v. Dickinson, 361 P.2d 412 (Utah 1961). "The very purpose of excluding such evidence is to prevent the prosecution from smearing an accused by showing a bad reputation and relying on that for conviction rather than being required to produce adequate proof of the crime in question." Id. at 12; E.g., State v. Smith, 675 P.2d 521, 526 (Utah 1983) (internal citations omitted).⁵

⁵ Even if Michael Nikols had been convicted of drug dealing, impeaching evidence of a prior conviction is restricted to the fact of the conviction and is not admissible to show the details and events of the crime. State v. Hansen, 448 P.2d 720 (Utah 1968) (allowing nature of crime to be elicited). Moreover, there is a split of authority among the courts as to whether a prior conviction for drug dealing is relevant in assessing a witness's credibility. Utah courts have not weighed in on the topic.

Mr. Chesnoff also sought to cross examine Michael regarding his alleged involvement in drug dealing and the facts underlying the charge of drug trafficking to impeach his credibility. Rule 608 of the Utah Rules of Evidence state that specific instances of conduct can be admitted to attack the witness' character for truthfulness if probative of truthfulness or untruthfulness. Utah R. Evid. 608(b).

Allegations of past acts involving drugs are irrelevant to credibility in both civil and criminal cases. Under Rule 608(b), cross examination is limited to specific instances of misconduct clearly probative of truthfulness. For example, in an age discrimination action, evidence that an employee who had brought the charge of sexual harassment had used marijuana two or three years before the incident was inadmissible to impeach her credibility since "illegal drug use or transactions, without more, do not show untruthfulness." Crimm v. Missouri Pacific R. Co., 750 F.2d 703 (8th Cir. 1984). See also Dennis v. State, 2008 WL 2744237, 1 (Fla. Dist. Ct. App.). In deciding whether a witness could be cross examined about whether he made a false statement regarding the rental value of land at issue in a case resolving a decedent's trust, the Court of Appeals of Arkansas incorporated an Arkansas Supreme Court ruling in a criminal case, which made the distinction between conduct such as "false swearing, fraud, and swindling" (which do relate to truthfulness) and conduct such as "murder, drug crimes, and assault" (which ordinarily do not). Farr v. Henson, 84 S.W.3d 871 (Ark. Ct. App. 2002) citing Rhodes v. State, 634 S.W.2d 107 (Ark. 1982).

Utah appellate courts hold the same with respect to other narcotics offenses. See State v. Shabata, 678 P.2d 785 (Utah 1984); State v. Martinez, 848 P. 2d 702 (Utah

App. 1993). Conduct such as drug use is only admissible where it serves the distinct purpose of challenging the witness's ability to perceive and recall the events in question. See Shabata, 678 P.2d at 788. It is not admissible to impeach the witness's character or show his propensity toward untruthfulness. Id.

The Court could not logically infer that Michael's testimony would have been adverse to his father's claim by his failure to testify. Even if Michael had testified consistent with his proffer and deposition that the conveyance was not a gift and had invoked his Fifth Amendment privilege in response to questions about drug trafficking, the only inference the Court could reasonably make was that Michael Nikols was a drug dealer. Michael's invocation of his Fifth Amendment privilege against self incrimination does not logically support an inference that his testimony would have been inconsistent with his father's testimony about the conveyance.

B. THE COURT ERRED WHEN IT ASSIGNED AN ADVERSE PRESUMPTION AGAINST JOHN NIKOLS FOR MICHAEL NIKOLS' FAILURE TO TESTIFY.

The Court could not draw an adverse presumption against John Nikols for Michael's failure to take the stand. Michael was available and willing to testify that the conveyance was not a gift. He was prevented from taking the stand as a result of the Court's error in conditioning his testimony on a waiver of his privilege against self-incrimination as discussed above. Therefore, no adverse inference can be drawn against John on the theory that he withheld relevant witness testimony.

John Nikols was not required to produce all accessible witnesses and may rest his case on his testimony alone. Beardsley v. Suburban Coach Co., 83 Ga. App. 381, 391-92

(Ga. Ct. App. 1951). For example, the Kentucky Court of Appeals held a purchase money resulting trust was created for the parents where the father titled property in his daughter's name even though the daughter's testimony was not admitted. Wilson, 286 S.W. 2d at 556. "Her conduct over the course of the years in permitting her father to have complete control of the property is more persuasive than any words she could utter." Id. Likewise, where a mother sought a constructive trust on her incompetent son's behalf the Texas Court of Appeals found the defendant's invocation of their privilege was not the sole basis for the judgment since she introduced checks drawn from her son's account in the exact amount of his father's mortgage payment. Flournoy v. Wilz, 201 S.W. 3d 833, 835-36 (Texas App. 2006).

The same is true in John Nikols' conveyance. It was unimportant for Michael Nikols to testify because his conduct in the 20 years since the conveyance is more persuasive than any testimony he could have given. John Nikols established a resulting trust preventing Michael Nikols' creditors to reach John Nikols' properties.

Even if it were appropriate, the inference drawn from Michael's invocation of his Fifth Amendment privilege was not probative proof of any essential facts of John Nikols' case. The Court could not logically infer that Michael's testimony would have been adverse to his father's claim by his failure to testify. Even if Michael had testified consistent with his proffer and deposition that the conveyance was not a gift and had invoked his Fifth Amendment privilege in response to questions about drug trafficking, the only inference the Court could reasonably make was that Michael Nikols was a drug dealer. Michael's invocation of his Fifth Amendment privilege against self incrimination

does not logically support an inference that his testimony would have been inconsistent with his father's testimony about the conveyance.

III. THE DISTRICT COURT ERRED IN DRAWING AN ADVERSE INFERENCE AGAINST JOHN NIKOLS WHEN APPELLEE CHESNOFF DID NOT TESTIFY IN SUPPORT OF HIS TWO CLAIMS: THAT HE RELIED ON THE TITLE TO SECURE PAYMENT AND THAT JOHN WAS ALSO A DEBTOR.

An adverse inference against John Nikols was inappropriate because it was not his obligation to call Mr. Chesnoff so Mr. Chesnoff could rebut John's evidence. Mr. Chesnoff raised two claims: that he relied on the title to secure payment and that John had guaranteed Michael's fee and was also Chesnoff's debtor, despite acknowledging in his affidavit that his fee agreement was not secured by any real property or other collateral. R. 18: ¶ 4.

John Nikols and his counsel invited Mr. Chesnoff's relevant testimony about any conversations between Mr. Chesnoff and John in support of his claims. However, at the Evidentiary Hearing, counsel for Mr. Chesnoff repeatedly threatened to divulge irrelevant, privileged attorney-client communications between him and Michael about Michael's criminal case. At least three times Mr. Chesnoff's counsel told the Court that Mr. Chesnoff would detail discussions he had with Michael about his distribution charges despite its irrelevance in the case: first, ". . . I fully intend to question him about his credibility and his involvement with drugs." R. 2953: 117 (2-7); second, "Now we want to make this a question of what Mr. Chesnoff relied upon. And in doing so, you will put — you will subject yourself to clear testimony that he dealt drugs and admitted to the same." R. 2953: 129 (8-11); and third:

“And I think that, if Mr. Michael Nikols would have answered truthfully and admitted, as he did to Judge Cassell and others, that he was a drug dealer for many, many years, and that’s the case that goes up on appeal, that this resulting trust was a concoction between an admitted drug dealer — major drug dealer — and his father, that makes all the difference in the world in my case if I don’t have that. But the second prong of the resulting trust was an admitted long-time, head drug kingpin drug dealer, then that prejudices me to a great extent.” R. 2953: 155 (10-20).

The Court’s adverse inference against John was error for four reasons: First, Mr. Chesnoff could not have relied on the properties’ bare title as a surety for his services; second, Michael Nikols – not John Nikols – was Mr. Chesnoff’s debtor; third, an adverse inference against John Nikols is inappropriate where it was not John’s obligation to produce Mr. Chesnoff; and finally, Mr. Chesnoff could have established his claims against John Nikols without violating his attorney-client privilege with Michael Nikols.

A. THE EVIDENCE ESTABLISHED MR. CHESNOFF DID NOT RELY ON THE PROPERTIES’ TITLE AS A SURETY FOR HIS SERVICES.

Mr. Chesnoff failed to produce evidence that he relied on the properties’ bare title to secure the fee for his legal services to Michael. Indeed, he could not have reasonably relied on bare title when he undertook Michael’s representation in the criminal case.⁶ In his affidavit in support of his complaint, Mr. Chesnoff states: “The parties retainer agreement was not secured by real property or any other real collateral.” R. 18: ¶ 4.

In the indictment against Michael Nikols, the government claimed that the four Murray properties currently at issue were subject to criminal forfeiture because they were titled in Michael’s name. Knowing that the properties were encumbered by a federal lis

⁶ The Court specifically asked Mr. Chesnoff if he had evidence he relied on the properties’ bare title, to which Mr. Chesnoff did not answer. R. 2953: 31 (7-10).

pendens and subject to criminal forfeiture proceedings, Mr. Chesnoff could not have reasonably relied on those properties to secure his fee. . . R. 421, Exhibit C: 19 (14-18); R. 361: 6, (7-8); R. 2953: 131 (7-18).

Moreover, Mr. Chesnoff was aware of John's claim that he was the owner and advocated that position in the federal court proceedings. On three separate occasions Mr. Chesnoff, as an officer of the court, asserted that John Nikols paid the purchase price for the four Murray properties and was the owner of the properties. First, during a Status Hearing on September 29, 2005, Mr. Chesnoff told the Honorable Paul Cassell:

"We're confident, Your Honor, that when we proceed to trial you'll find out with respect to monetary gain, none of these properties are in any way associated with any kind of criminal activity, they are not – they were purchased in the '80s and '90s, they have nothing to do with these activities, you'll see that, I make that representation to you based on my investigation and the work we've done to prepare for the trial."

R. 421, Exhibit C: 16 (13-21). Second, during Michael's Detention Hearing on October 6, 2005, Mr. Chesnoff told the Court that the four Murray properties did not belong to Michael Nikols. "Every dime that Mr. Nikols has or his father as of this juncture, Your Honor, is the result of good old fashioned hard work." R. 996, Exhibit 2: 23 (17-20).

"Unfortunately, Your Honor, we're not doing the forfeiture portion of the case at this juncture, but I represent to you, Your Honor, that one of the strongest parts of the defense of this Indictment is to the forfeitures. The properties that have been seized were purchased by Mr. Nikols' father in the '80s and '90s. Now, I don't think it's appropriate for the government, or most respectfully the court, to extrapolate out that somehow Mr. Nikols had something to do with the purchases of those properties because his father is prepared at the appropriate time to testify as to how those properties were purchased, which is from money he earned working every day as hard as he could in his restaurant business and other ventures that were legitimate ventures." R.996, Exhibit 2: 23-24.

Third, at the evidentiary hearing in the pending matter, Mr. Chesnoff's counsel stated: "Michael's drug money was not used to acquire the Murray properties. . . John bought the property. It wasn't purchased with the proceeds of drug money. Mr. Chesnoff made certain of that." R. 2953: 140-41. Mr. Chesnoff could not have reasonably relied on the bare title to the properties to secure his retainer when he told two different courts on three separate occasions that Michael did not own them.

Even if Mr. Chesnoff's claim that he relied on bare title to secure his fee were credible, reliance on bare title, without more, does not give rise to a creditor's complaint against the owner of land titled in the debtor's name. The Supreme Court of New York, Appellate Division, Second Department, held that where a husband held his wife's property in trust for her, the husband's creditors did not have an equal or superior right to the property than his wife. "It does not appear that any reliance on the fact that title was in the name of the husband gave rise to any claim resulting from the judgment. From the face of the complaint their rights are measured by whatever interest the husband had in the property." Caldarola v. Caldarola, 87 N.Y.S. 2d 883, 884 (N.Y. App. Div. 1949).

B. THE EVIDENCE ESTABLISHED JOHN NIKOLS WAS NOT MR. CHESNOFF'S DEBTOR.

Mr. Chesnoff failed to present any evidence that John Nikols guaranteed *Michael's debt with John's four Murray properties. The retainer agreement is addressed to Michael Nikols and is signed by Michael and David Chesnoff. R. 532, Attachment C.* No where on the document is John Nikols named and no other documents were executed.

Utah code mandates that “every promise to answer for the debt, default, or miscarriage of another” is void unless it is in writing, signed by the party to be charged with the agreement. Utah Code Ann. § 25-5-4 (1953).

Mr. Chesnoff did not create a promissory note or a deed of trust securing the properties, he titled his complaint to recover attorney fees against Michael Nikols and did not name John Nikols as a responsible party, and he has made no other effort to collect from John Nikols. Mr. Chesnoff even acknowledged in his affidavit to the Court that: “The parties’ retainer agreement was not secured by real property or any other real collateral.” R. 18: ¶ 4.

If Mr. Chesnoff wanted a guaranty agreement subsequent to execution of his retainer agreement, he should have either executed a separate document or at the very least should have made explicit provisions in the fee agreement. Auto. Mfrs. Warehouse, Inc. v. Serv. Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) (“had the parties wanted a guaranty agreement on the open account they should have either executed a separate document or at the very least they should have made explicit provisions therefor in the other documents. The law requires that promises to answer for the debt, default, or miscarriage of another be written”).

Mr. Chesnoff’s claim that John Nikols was his actual debtor also directly contradicts the Court’s own findings. The Court ordered a judgment against Michael Nikols, determining there was no attorney-client relationship between John Nikols and Mr. Chesnoff. The Court made four relevant findings: first, it found that Michael entered into a retainer agreement with Mr. Chesnoff and agreed to pay \$350,000 under that

agreement and still owed \$190,000 to Mr. Chesnoff; third, there was a dispute of ownership regarding the properties and thus further discovery was required; fourth, there was no attorney-client relationship between Chesnoff and John; and finally, the \$200,000 settlement in lieu of the forfeiture “was against Michael only, and John was not obligated to pay the \$200,000 judgment, nor was he a party to the plea agreement.” R. 1957: 4-6.

Mr. Chesnoff’s claims that his contract with Michael Nikols was guaranteed by John Nikols are contrary to the Court’s order and its reliance on the four corners of the fee agreement.

Even if Mr. Chesnoff had evidence to show John Nikols was his actual debtor, that evidence would be inadmissible. Parol evidence is generally inadmissible to modify written terms of an integrated agreement. West One Trust Co. v. Morrison, 861 P.2d 1058, 1061 (Utah Ct. App. 1993); Hall v. Process Instruments & Control, Inc., 866 P.2d 604, 606 (Utah Ct. App. 1993). “All preliminary negotiations, conversations, and verbal agreements are merged in and superseded by the subsequent written contract, and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties and its terms cannot be altered by parol evidence.” Lamb v. Bangart, 525 P.2d 602, 607 (Utah 1974) (internal citations omitted); See also Winegar v. Froerer Corp., 813 P.2d 104, 110 (Utah 1991) (“A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain”). Mr. Chesnoff argued in his Motion for Summary Judgment that it would be improper to allow parol evidence that would change the terms of the agreement since its terms and conditions are unambiguous. R.361: 12.

No evidence supports Mr. Chesnoff's claim that John is also his debtor. He has not produced any documents in support of his claim that John Nikols acted as a guarantor for his son's retainer agreement, as is required under Utah code. A father's statement, without more, that he will do his best to help pay his son's legal fees, does not create a legal right of his son's debtor to seize his property. The fee agreement between Michael Nikols and Mr. Chesnoff was far from a secure transaction entitling Mr. Chesnoff to land owned by John Nikols.

C. AN ADVERSE INFERENCE AGAINST JOHN NIKOLS IS
INAPPROPRIATE WHERE IT WAS NOT JOHN'S OBLIGATION TO
CALL MR. CHESNOFF.

The Court erred in drawing an adverse inference against John Nikols for Mr. Chesnoff's decision not to testify. For an adverse inference to apply, four factors must be present: "(1) it appears that the documentary evidence exists or existed; (2) the suppressing party has possession or control of the evidence; (3) the evidence is available to the suppressing party, but not to the party seeking production; (4) it appears that there has been actual suppression or withholding of evidence." Gilbert v. Costco, 989 F.2d 399, 406 (10th Cir. 1993) citing Eyans v. Robbins, 897 F.2d 966, 970 (8th Cir. 1990). The inference is intended to punish parties who are withholding witness testimony – not to penalize parties who do not have the power to produce witnesses to testify. Roth v. New Hotel Monteleone, L.L.C., 978 So. 2d 1008, 1012 (La. Ct. App. 2008).

For an adverse inference to arise from a party's failure to produce a witness, it must find that witness was available and that the witness was one that the particular party would naturally produce. Ready Mix Concrete Co. v. National Labor Relations Board, 81

F.3d 1546, 1552 (10th Cir. 1996) (witness testimony out of party's control). It would not be natural for John Nikols to call Mr. Chesnoff, his opposing party, to testify in opposition to John's evidence. An adverse presumption against him was error.

John Nikols established his case before submitting it to Mr. Chesnoff's witnesses, at which point Mr. Chesnoff chose not to testify. A sufficient showing that one other than legal titleholder paid purchase price for property makes a prima facie case that beneficial ownership rests in the payor. Hocking, 394 N.E. 2d at 657. The Court found John met his burden but allowed the improper adverse inferences – and nothing more – to eliminate John's prima facie showing:

“I'm troubled by the fact that it appears that, at least from one side of the testimony, that John Nikols has invested his money in buying these properties and that he's claimed that he's regarded them as his properties ... I mean, I don't — I don't think that you win just by presenting the prima facie case.”

R. 2953: 152-53. Contrary to the Court's ruling, when John Nikols met his burden, it was Mr. Chesnoff's own obligation to rebut John's case. It is irrational to argue that one party is obliged to produce its opposition's evidence.

It was Mr. Chesnoff – not John Nikols – who failed to testify in the face of probative evidence. Any adverse inference in this case would have been more appropriate against Mr. Chesnoff. The failure to testify impairs the value of one's evidence and gives greater credence to the positive evidence of the other party. Stocker v. Boston & M. R. R., 151 A. 457, 458 (N. H. 1930). It does not, however, create substantive proof of any claims. For example, when considering all the circumstances of a case against a banker who did not testify in his defense, the Supreme Court of South

Carolina upheld his loss based on the district court's adverse inference against him because the opposing party's claims were supported by testimony and a number of documents. South Orange Trust Co. v. Conner, 228 S.C. 218, 275 (1955); See also Flourney, 201 S.W. 3d at 837.

Mr. Chesnoff's produced no positive evidence in support of his claims. He did not testify, although he could, regarding conversations he had with John Nikols and conversations he had with his client, Michael Nikols, about his payment and the Nikols' properties. His failure to testify impairs his own evidence and gives greater credence to John's positive evidence. The Court inappropriately assigned an adverse inference against John Nikols.

D. MR. CHESNOFF COULD HAVE ESTABLISHED HIS CLAIMS
AGAINST JOHN NIKOLS WITHOUT DISCLOSING PRIVILEGED
COMMUNICATIONS BETWEEN HIMSELF AND MICHAEL NIKOLS.

Mr. Chesnoff could have testified about his conversations with John Nikols without revealing privileged communications with his former client damaging to his pending criminal case. Mr. Chesnoff's claim that he relied on the land's bare title to secure payment did not require him to divulge information that "will not be good testimony for Mike." R. 2953: 128.

The claim that John Nikols had guaranteed the fee agreement and was his actual debtor hinged on statements made to him by John Nikols – not by Michael Nikols. John's counsel made it clear that she did not oppose Mr. Chesnoff's relevant testimony. "I don't have any problems at all having Mr. Chesnoff testify about representations that John made. If that's what he wants to do and he feels that he needs to put that evidence on, I'm

in no position to tell him not to.” R. 2953, P.135, L.6-9. But Mr. Chesnoff repeatedly threatened to divulge adverse privileged communications between Michael Nikols and himself. Supra sources cited p.29.

Mr. Chesnoff relied on the Utah Rules of Professional Conduct as his authority that Michael Nikols waived his entire attorney-client privilege when he sued Mr. Chesnoff for malpractice. R. 2953: 121 (10-23). Rule 1.6 of the Utah Rules of Professional Conduct states that a lawyer may reveal information relating to the representation of a client, to the extent the lawyer reasonably believes necessary,

“to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” Utah Rules of Prof’l Conduct R. 1.6(b)(5).

The comment to the Rule States:

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. . . In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. Utah Rules of Prof’l Conduct R. 1.6(b)(5) cmt. 14.

The case in controversy was not between Michael and his attorney, Chesnoff. Michael’s malpractice claim had already been adjudicated. The case in controversy was between Chesnoff and John Nikols. The claim that John Nikols guaranteed Michael’s legal fees was not based upon conduct in which Michael was involved in relation to his defense to the criminal charges. The only reasonably necessary information Mr.

Chesnoff could have revealed was regarding his source of payment. Mr. Chesnoff asserted in Court that the source of revenues for the properties was not from drug money. Nothing Mr. Chesnoff could testify about regarding his conversations with John Nikols would have violated his ethical duty to Michael. This is especially true since Mr. Chesnoff could not have reasonably believed his privileged communications with Michael about his narcotics charge were relevant to representations made to him by John Nikols regarding payment of the fees.

CONCLUSION

Based on the aforementioned arguments, Mr. John Nikols urges this Court to find the Court erred in allowing Michael Nikols' creditor to seize his Properties.

RESPECTFULLY submitted this 26th day of September, 2008.

SKORDAS, CASTON & HYDE, LLC

A handwritten signature in black ink, appearing to be 'Rebecca C. Hyde', written over a horizontal line.

Rebecca C. Hyde
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the ____26th____ day of September, 2008, I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, by United States first class mail, postage pre-paid, to the following:

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Addendum A

Utah Rules of Evidence, Rule 608

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

→RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(c) **Evidence of bias.** Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

[Amended effective October 1, 1992; November 1, 2004.]

ADVISORY COMMITTEE NOTE

Subdivisions (a) and (b) are the federal rule, verbatim, and are comparable to Rules 22 and 6, Utah Rules of Evidence (1971), except to the extent that Subdivision (a) limits such evidence to credibility for truthfulness or untruthfulness. Rule 22(c), Utah Rules of Evidence (1971) allowed a broader attack on the character of a witness as to truth, honesty and integrity.

This rule should be read in conjunction with Rule 405. Subdivision (b) allows, in the discretion of the court on cross-examination, inquiry into specific instances of the witness's conduct relative to his character for truthfulness or

Utah Rules of Evidence, Rule 608

untruthfulness or specific instances of conduct of a person as to whom the witness has provided character testimony. See, State v. Adams, 26 Utah 2d 377, 489 P.2d 1191 (1971). Attack upon a witness's credibility by specific instances of character other than conviction of a crime is inadmissible under current Utah law. Cf. Bullock v. Ungricht, 538 P.2d 190 (Utah 1975); Rule 47, Utah Rules of Evidence (1971). Allowing cross-examination of a witness as to specific instances affecting character for truthfulness is new to Utah practice and in accord with the decision in Michelson v. United States, 335 U.S. 469 (1948). The cross-examination of a character witness as to specific instances of conduct which the character witness may have heard about concerning the person whose character is placed in evidence has been sanctioned by a prior decision, State v. Watts, 639 P.2d 158 (Utah 1981).

The rule is subject to a witness invoking the statutory privilege against degradation contained in Utah Code Annotated, Section 78-24-9 (1953). See, In re Peterson, 15 Utah 2d 27, 386 P.2d 726 (1963). The privilege, however, may be subject to limitation to accommodate an accused's right of confrontation. Cf. Davis v. Alaska, 415 U.S. 308 (1974).

Subdivision (c) is Rule 608(c), Military Rules of Evidence, verbatim.

[The 2004] amendment [to (b)] is in order to be consistent with changes made to the Federal Rule.

Addendum B

Utah Rules of Evidence, Rule 609

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

→RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Utah Rules of Evidence, Rule 609

[Amended effective October 1, 1992.]

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and changes Utah law by granting the court discretion in convictions not involving dishonesty or false statement to refuse to admit the evidence if it would be prejudicial to the defendant. Current Utah law mandates the admission of such evidence. State v. Bennett, 30 Utah 2d 343, 517 P.2d 1029 (1973); State v. Van Dam, 554 P.2d 1324 (Utah 1976); State v. McCumber, 622 P.2d 353 (Utah 1980).

There is presently no provision in Utah law similar to Subsection (d).

The pendency of an appeal does not render a conviction inadmissible. This is in accord with Utah case law. State v. Crawford, 60 Utah 6, 206 P. 717 (1922).

This rule is identical to Rule 609 of the Federal Rules of Evidence. The 1990 amendments to the federal rule made two changes in the rule. The comment to the federal rule accurately reflects the Committee's view of the purpose of the amendments.

Addendum C

C

West's Utah Code Annotated Currentness

Title 25. Fraud

Chapter 5. Statute of Frauds

→ § 25-5-4. Certain agreements void unless written and signed

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(b) every promise to answer for the debt, default, or miscarriage of another;

(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and

(f) every credit agreement.

(2) (a) As used in Subsection (1) (f) and this Subsection (2):

(i) (A) "Credit agreement" means an agreement by a financial institution to:

(I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action;

(II) otherwise extend credit; or

(III) make any other financial accommodation.

(B) "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives

a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means:

(A) a state or federally chartered:

(I) bank;

(II) savings and loan association;

(III) savings bank;

(IV) industrial bank; or

(V) credit union; or

(B) any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act.

(b) (i) Except as provided in Subsection (2)(e), a debtor or a creditor may not maintain an action on a credit agreement unless the agreement:

(A) is in writing;

(B) expresses consideration;

(C) sets forth the relevant terms and conditions; and

(D) is signed by the party against whom enforcement of the agreement would be sought.

(ii) For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (2)(b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships.

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The pro-

vision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

(i) the debtor is provided with a written copy of the terms of the agreement;

(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and

(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Laws 1909, c. 72, § 1; Laws 1989, c. 257, § 1; Laws 1996, c. 182, § 24, eff. July 1, 1996; Laws 2004, c. 92, § 24, eff. March 17, 2004.

Codifications R.S. 1898, § 2467; C.L. 1907, § 2467; C.L. 1917, § 5817; R.S. 1933, § 33-5-4; C. 1943, § 33-5-4.

HISTORICAL AND STATUTORY NOTES

Laws 2004, c. 92, rewrote this section that formerly provided:

"The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

"(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

"(2) every promise to answer for the debt, default, or miscarriage of another;

"(3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

"(4) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;

"(5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation;

"(6) every credit agreement.

"(a) As used in Subsection (6):

"(i) "Credit agreement" means an agreement by a financial institution to lend,

Addendum D

Rules of Prof.Conduct, Rule 1.6

West's Utah Court Rules Annotated Currentness
State Court Rules
Utah Code of Judicial Administration
Part II. Supreme Court Rules of Professional Practice
Chapter 13. Rules of Professional Conduct (Refs & Annos)
Client-lawyer Relationship

→RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used the lawyer's services;

(b)(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud and in furtherance of which the client has used the lawyer's services;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(b)(6) to comply with other law or a court order.

(c) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on an Utah State Bar endorsed lawyer assistance program.

[Amended effective November 1, 2005.]

Rules of Prof. Conduct, Rule 1.6

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory

Rules of Prof.Conduct, Rule 1.6

conclusion to the matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will

Rules of Prof. Conduct, Rule 1.6

be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.

The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in

Rules of Prof.Conduct, Rule 1.6

connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

[19] Paragraph (c) is an addition to ABA Model Rule 1.6 and provides for confidentiality of information between lawyers providing assistance to other lawyers under an Utah State Bar endorsed lawyer assistance program.